

Pope v Saget

2005 NY Slip Op 30052(U)

January 5, 2005

Supreme Court, New York County

Docket Number: 0119884/9884

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Sherry Klein Heitler
Justice

PART 30

Kenosha Pope

INDEX NO. 119829/02

Alex Sager Jr.

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

FILED

FEB - 9 2005

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion **NEW YORK COUNTY CLERK'S OFFICE**

is decided in accordance with the memorandum decision dated 1-5-05.

Dated: 1-5-05

Sherry Klein Heitler
Duplicate Original
SHERRY KLEIN HEITLER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

-----X

KENDALLE POPE, as Executrix of the Estate of
Maud Atkins and KEVIN SMITH,

Plaintiffs,

Index No.
119884/02

-against-

ALIX SAGET, ALIX SAGET, JR.,
DAVID CARTER, ALEW MANAGEMENT
& DEVELOPMENT, LLC, EQUITY SETTLEMENT
SERVICES, INC., MERCURY HOMES REHAB, LLC,
ELIAZER ELIAS, SUN TRUST MORTGAGE, INC.,
Et al.

Defendants.

-----X

FILED
FEB - 9 2005
NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J.:

Motion Sequence Nos. 003 and 004 are consolidated for disposition. In Sequence No. 003, defendants Sun Trust Mortgage, Inc. (Sun Trust), Alew Management & Development LLC (Alew) and Eliazer Elias move for an order dismissing the complaint, as against them. In Sequence No. 004, plaintiffs Kendalle Pope and Kevin Smith, move, pursuant to CPLR § 3212, for an order granting them summary judgment against the defendants Alix Saget (Saget), Alix Saget, Jr. (Saget, Jr.), David Carter, Alew, Equity Settlement Services, Inc. (Equity), Mercury Homes Rehab, LLC (Mercury), Eliazer Elias and Sun Trust.

This is an action to compel the determination of any claims adverse to those of the

plaintiffs in premises known as 145 West 132nd Street, New York, New York (Property).

Plaintiffs also seek damages, claiming that defendants caused or facilitated a series of title transfers which deprived them of the Property.

Maud Atkins died on February 12, 1998, and her will was admitted to probate by the Surrogate's Court, New York County. Pope holds the Property as executrix of Atkins' Estate, and Kevin Smith, Pope's brother, claims the subject property as a devisee under the will of Atkins. Plaintiffs claim that Atkins owned and was in occupancy of the premises from 1979 until the time of her death. However, after Atkins' death, plaintiffs learned of a series of title transfers that, if valid, would divest the Atkins Estate of the Property. A deed purportedly executed on January 17, 1998, from Maud Atkins to Saget was recorded on May 22, 2002 (Atkins-Saget Deed). A deed purporting to have been executed on July 16, 2002 by Saget to Mercury was recorded on August 14, 2002 (Saget-Mercury Deed). A deed purportedly executed on August 7, 2002, from Mercury to Elias was recorded on October 10, 2002 (Mercury-Elias Deed). A \$465,200 mortgage, purportedly executed on August 7, 2002 by Elias in favor of Sun Trust, was recorded on October 2, 2002. Elias then transferred the property to Alew, a corporation owned by him.

Plaintiffs' complaint contains three causes of action. The first cause of action seeks a determination that the Atkins-Saget deed was a forgery. The second and third causes of action allege that the defendants' filing of the various deeds and the mortgage with the New York City Register of Deeds constituted a misrepresentation or fraud upon plaintiffs, resulting in damages.

In support of their claim of forgery, plaintiffs point out the following:

1. Although Atkins' will was signed as "Maud Atkins," her true name, the deed was signed

“Maude Atkins;”

2. Atkins died less than one month after the execution of the Atkins-Saget deed, at a time when she was 96 years old, had been bed-ridden for several years, had suffered multiple strokes and was unable to write;
3. The Florida notary before whom the Atkins-Saget deed was purportedly executed had never been commissioned as a Florida Notary Public;
4. The Atkins-Saget deed was not recorded until May 22, 2002, more than four years after its execution.

Saget denies that he ever purchased the Property from Atkins. At this point, Saget, Sun Trust, Alew and Elias concede that there was no delivery of a deed from Atkins to Saget. Equity, which performed title abstract services in connection with the transfer of property from Saget to Mercury, also concedes that there was no delivery of the deed. Criminal charges have been brought against defendant David Carter, who is alleged to have attempted to commit a fraud on plaintiffs. Plaintiffs have obtained a default judgment against Carter.

Plaintiffs are clearly entitled to a judgment declaring the Atkins-Saget Deed to be void. Thus, Elias and Alew, whose interests are ultimately derived from that deed, do not hold valid title to the Property, and Sun Trust has lost its mortgage security. They will have to look to their own title insurance for reimbursement. The only remaining question is whether plaintiffs are entitled to recover any damages.

In order to recover for fraud, plaintiffs must show a false representation of fact, made with knowledge of falsity, reliance on the part of plaintiffs, and damages (Channel Master Corp. v Aluminum Ltd. Sales, 4 NY2d 403 [1958]). As to Saget, the fraud consists of his alleged role

in taking a deed from Atkins. Although Saget denies that he took a deed from Atkins, the report of Chicago Title Company indicates otherwise. As to Sun Trust, Alew, Elias and Equity, their liability stems not from any statement made directly to plaintiffs (or to Atkins, before her death) but from their roles in bringing about the title transfers now found to be invalid. The theory of the case is that defendants made a material misrepresentation to plaintiffs when they forged and/or relied upon Atkins' forged signature on the Atkins-Saget deed and filed it with the City Register, and that plaintiffs relied, to their financial detriment, upon the misrepresentation that was reflected in the public record of the City Register.

Defendants maintain that, even if there were misrepresentations or fraud, plaintiffs have not established damages. At her deposition, the only damages specified by Pope were transportation costs into the City of New York for court appearances or depositions (see Pope deposition tr., at 20, lines 1-16). Pope indicates that Smith has been living at the premises and has exercised control and possession of the premises. To the extent, if any, that plaintiffs seek attorneys' fees as part of this action, such fees are not recoverable in the absence of a contract or statute permitting recovery (Hooper Assoc. v AGS Computers, Inc., 74 NY2d 487 [1989]).

Pope explains that the questions asked at the deposition related to expenses which she incurred personally, not to damages sustained by the Atkins Estate itself. Her papers indicate that the real damages incurred by the Atkins Estate consist of the loss of ability to rent the property to others pending the resolution of the title dispute. Pope has annexed a letter of a real estate broker indicating the rental value of the premises.

Saget has not explained how his name came to be on a deed. When Saget, Jr., was deposed, he invoked the Fifth Amendment privilege against self-incrimination. There is a triable

issue as to whether Elias, Alew, Equity and Sun Trust knew or should have known that the Atkins-Saget deed was a forgery. The existence of an incorrect name on the Atkins-Saget Deed, the rapid series of transfers of the Property and the unusually long time between the execution of the Atkins-Saget Deed and its recording, may well have put Elias, Alew, Equity and Sun Trust on notice that something was amiss with the Atkins-Saget Deed.

On the other hand, plaintiffs have not indicated precisely what efforts they made to lease the premises to others during the time that Smith has been in occupancy. Moreover, documentary evidence appears to indicate that tax liens in the amount of approximately \$20,000 were paid off at the time of the alleged transfer of the premises from Alix Saget to Mercury. Elias himself paid property taxes for several months after he supposedly acquired the property. Thus, in the event that plaintiffs are ultimately found to be entitled to damages, defendants will be entitled to an offset for taxes paid. At this point, plaintiffs are not entitled to summary judgment on the issue of damages, nor are defendants Sun Trust Mortgage, Inc., Alew Management & Development LLC and Eliazcr Elias entitled to dismissal of the complaint as against them.

Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment is granted only to the extent of declaring that Kevin Smith is the lawful owner of the Property, and that any deed or mortgage held by any of the other defendants is declared void as against Kevin Smith; and it is further

ORDERED that the portion of plaintiffs' motion which seeks summary judgment on the issue of damages is denied; and it is further

ORDERED that the motion of defendants Sun Trust Mortgage, Inc., Alew Management

& Development LLC and Eliazer Elias for dismissal of the complaint as against them is denied.

This shall constitute the decision and order of the court.

DATED: January 5, 2005

Sherry Klein Heitler

 SHERRY KLEIN HEITLER
 J.S.C.
Sherry Klein Heitler
Duplicate Original
 2.8.05
 SHERRY KLEIN HEITLER

FILED
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